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the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."¹⁷

EQUITABLE RELIEF AGAINST NUISANCES.—While it has long been a recognized rule of equity that in case of continuing nuisances an injunction will be granted, as a matter of right, where there is irreparable injury or a multiplicity of suits, the courts universally make two exceptions to the rule, and will weigh and balance the individual injuries of each party before the relief is granted. In the first place, where the plaintiff seeks only a temporary restraint, unless there is a pressing necessity for immediate relief the injunction will be refused.¹ Again, it has been held that the petitioner must seek his remedy at law when he has purchased property within the scope of the nuisance for the purpose of compelling the defendant to buy his legal rights at an exorbitant price.² Assuming, however, that the injunction should be granted as a matter of right in all cases where the remedy at law is inadequate, the motive or intention of the parties should not defeat the logical operation of the rule.³ But when the plaintiff acquired his property with a desire to speculate on the defendant's willingness or ability to pay for the continued existence of his nuisance, viewed from the standpoint of "the man in the street," the denial of an injunction would work substantial justice.

A more troublesome question is presented, however, where the evidence clearly proves the complainant's rights are being infringed by the defendant's wrongful act, but the damage caused is slight as compared with the expense and loss to the defendant if an injunction is granted. There is a decided diversity of opinion in such cases in determining whether the injunction should issue as a matter of right, or whether it is within the discretion of the court to deny equitable relief on the ground that the plaintiff is entitled to nothing except as a matter of grace. In the recent case of *Whalen v. Union Bag & Paper Co.* (1913) 101 N. E. 805 the New York Court of Appeals refused to balance the conveniences between the plaintiff and the defendant, and granted an injunction prohibiting the defendant from inflicting a comparatively small damage on the plaintiff's riparian rights. This result is fully sustained by eminent authorities in this

¹⁷*Bement v. Nat. Harrow Co.* (1901) 186 U. S. 70, 91; *Henry v. Dick, supra*; *Cortelyou v. Johnson* (C. C. 1905) 138 Fed. 110, reversed, 207 U. S. 196, solely because of failure to give notice of license restrictions; *United States v. Standard Sanitary Co.* (C. C. 1911) 191 Fed. 172, 190, affirmed, 226 U. S. 20; *Blount v. Yale-Towne Mfg. Co.* (C. C. 1909) 166 Fed. 555. In the two cases last cited the conditions attempted to be imposed by the patentee involved an agreement to restrain trade in unpatented articles or a combination to restrain trade in competing patented articles, and being unlawful by virtue of the Sherman Act were properly held invalid.

¹This follows from the inherent nature of a temporary injunction in as much as in its operation it is very analogous to a judgment and execution before trial. *Mammoth Vein Coal Co.'s Appeal* (1867) 54 Pa. 183; 1 *Joyce, Injunctions* § 109.

²*Edwards v. Allouez Mining Co.* (1878) 38 Mich. 46; *McCleery v. Highland Boy Gold Min. Co.* (C. C. 1904) 140 Fed. 951.

³*Savannah Ry. v. Woodruff* (1890) 86 Ga. 94.

country, as well as in England.⁴ And it is declared by these courts that no amount of discretion can deprive the injured party of the remedy recognized by the well established rules of equity. The doctrine has for its foundation the conception of ownership so jealously guarded in common law countries—that no man shall be deprived of his property for the benefit of a private individual. The result of the denial of an injunction in such cases is the same whether the plaintiff is driven to pursue his remedy at law, or whether, the legislature vests in the courts the power to exercise discretion in awarding damages instead of an injunction.⁵ It results in a forced sale of individual rights at private valuation.⁶ The authorities taking a contrary view support their conclusion on the contention that where the defendant is operating an extensive enterprise which is of benefit to the entire community, he should not be compelled to close his establishment because he cannot avoid a slight infringement of the plaintiff's rights. Consequently the interest of all parties would be best preserved by a careful examination of the plaintiff's loss, as compared with the injury to the defendant if an injunction was granted; and in case the latter greatly exceeded the former the plaintiff should be made to accept damages and the defendant permitted to continue the nuisance.⁷ The practical result of this contention is to give eminent domain privilege to private persons. While it might well be

⁴Where defendant interfered with plaintiff's riparian rights:—*Williams v. Gold Min. Co.* (1909) 85 S. C. 1; *Stock v. Township* (1897) 114 Mich. 357; *Higgins v. Flemington Water Co.* (1883) 36 N. J. Eq. 538; *Young Co. v. Bankier Distillery Co. L. R.* [1893] App. Cas. 691; see *Mining Co. v. Mining Co.* (1897) 9 Col. App. 407. Where there was smoke, fumes, or other nuisances:—*Amer. Smelting & Refining Co. v. Godfrey* (C. C. A. 1907) 158 Fed. 225; *Sullivan v. Steel Co.* (1904) 208 Pa. 540; *Hennessy v. Carmony* (1892) 50 N. J. Eq. 616; *Broadbent v. Imperial Gas Co.* (1856) 7 DeG. M. & G. 436, 460, affirmed (1859) 7 H. L. C. *600; *Shelfer v. Elec. Light Co. L. R.* [1895] 1 Ch. 287; *Goodson v. Richardson* (1874) L. R. 9 Ch. App. 221.

⁵Lord Cairn's Act 21-22 Vict. c. 27; *Madison v. Ducktown Sulphur Copper & Iron Co.* (1904) 113 Tenn. 331, 364; *Cittarotto v. Judge* (1885) 37 La. Ann. 573. But even this does not justify the court in giving damages where the ordinary rules of equity require that the plaintiff be given a permanent relief. *Shelfer v. Elec. Light Co.*, *supra*.

It is doubtful whether the legislature under a constitution containing a due process of law clause could permit a court to force a man to part with his property rights in favor of a private individual simply because it would be expensive to the latter to discontinue the nuisance. See *Hennessy v. Carmony*, *supra*.

⁶*Stock v. Township*, *supra*; *Tucker v. Howard* (1880) 128 Mass. 361; 1 Pomeroy, Eq. Juris. (3rd ed.) § 531.

⁷*Bliss v. Washoe Copper Co.* (C. C. A. 1911) 186 Fed. 789; *Bliss v. Anaconda Copper Min. Co.* (C. C. 1909) 167 Fed. 342; *McCarthy v. Bunker Hill & Sullivan Min. Co.* (C. C. A. 1908) 164 Fed. 927; *Mountain Copper Co. v. U. S.* (C. C. A. 1906) 142 Fed. 625; *Reideman v. Mt. Morris Elec. Light Co.* (N. Y. 1900) 56 App. Div. 23; *English v. Progress Co.* (1891) 95 Ala. 259; *Gray v. Manhattan Ry.* (1891) 128 N. Y. 499; *Demarest v. Hardham* (1881) 34 N. J. Eq. 469; *Richard's Appeal* (1868) 57 Pa. 105. But see the recent Pennsylvania District Court decision in the case of *Kestner v. The Homeopathic Medical & Surgical Hospital of Reading* (The Legal Intelligencer, Oct. 10, 1913.)

applied to public or quasi-public corporations,⁸ to grant the same power to enterprises not affected with a public interest is not consonant with the common law methods of protecting property. The determination of this question resolves itself into a matter of policy in the disposition of private rights, and since in the majority of these cases the public is the party primarily concerned, the proper proceeding would be to compel the defendant to acquire its rights so to act by constitutional condemnation.

WHAT LAW GOVERNS CONTRACTS OF INTERSTATE CARRIAGE?—The frequency of contractual provisions exempting carriers partially or entirely from their common law liability, and the diversity between the rules of the several states as to the validity of such provisions¹ have necessitated repeated judicial consideration of the question as to what law determines the validity or invalidity of such stipulations. In absence of legislation by Congress on the subject,² the question is one of the conflict of state laws,³ since under the police power it is competent for the state legislatures,⁴ or courts⁵ to decide, even in cases of interstate carriage, whether these contracts shall be upheld.

The cases almost universally recognize the basic principle that *prima facie* the *lex loci contractus* governs, unless the contract is wholly to be performed elsewhere. But in the application of this doctrine the results reached in the various jurisdictions are by no means harmonious. In one jurisdiction the delivery is considered to be the entire performance, consequently, the law of the place of delivery is enforced.⁶ This view is, however, based on a false assumption of fact, for any part of the journey constitutes as much part of the performance as the delivery.

The rule of most jurisdictions in which exemption stipulations are held invalid is that, though they would be sustained by the *lex loci contractus*, comity does not require the courts to enforce agreements

⁸In cases where the business is affected with a public interest the attitude of the New York courts in the Elevated and Subway Railway Cases is a typical example. See 3 COLUMBIA LAW REVIEW 413.

¹1 Page, Contracts, 559 *et seq.*; 13 COLUMBIA LAW REVIEW 249.

²Congress has exercised its undoubted power to enact such legislation by the Carmack Amendment to the Hepburn Act. Act of June 29, 1906, ch. 3591, § 7, pars. 11, 34 Stat. at Large 595. For the interpretation of this statute, see *Carpenter v. U. S. Exp. Co.* (1912) 120 Minn. 59.

³Aside from the federal statutes there is a class of cases where the federal law is applied practically, if not theoretically. It is well known that the federal courts decide questions of "general commercial law" on their independent judgment unless there is a state statute on the subject; *Swift v. Tyson* (1842) 16 Pet. 1; and the Supreme Court has held that exemption stipulations fall within the operation of this principle. *Liverpool Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397.

⁴*Chicago, etc. Ry. v. Solan* (1898) 169 U. S. 133, affirming (1895) 95 Ia. 260.

⁵*Penn. R. R. v. Hughes* (1903) 191 U. S. 477, affirming (1902) 202 Pa. 222; *Davis v. Chicago, etc. Ry.* (1896) 93 Wis. 470.

⁶*Pittsburgh, etc. Ry. v. Sheppard* (1897) 56 Oh. St. 68.